UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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NATIONAL CREDIT UNION ADMINISTRATION BOARD, AS LIQUIDATING AGENT FOR THE AMALGAMATED TAXI FEDERAL CREDIT UNION,

95 CV 253

Plaintiff,

-against-

MEMORANDUM AND ORDER

JOHN VARDAKIS and UTOG 2-WAY RADIO a/k/a CHARGE & TRAVEL 2-WAY RADIO,

Defendants.

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HOWARD STERN, ESQ.
48 East 43rd Street, 7th
New York, New York 11201
for plaintiff.

JOHN VARDAKIS
22-61 26th Street
Astoria, New York 11105
defendant pro se.

NICKERSON, District Judge:

Plaintiff National Credit Union Administration Board brought this action on January 19, 1995 against defendants John Vardakis and UTOG 2-Way Radio, a corporation, to recover on a promissory note and for damages. On November 6, 1995 the action was

discontinued against UTOG 2-Way Radio. On September 11, 1996 the court entered default judgment against defendant Vardakis. Defendant now moves to vacate the default.

I. Facts

The following facts are undisputed. On January 13, 1989 defendant executed and delivered to Amalgamated Taxi Federal Credit Union (Amalgamated) a promissory note and security agreement whereby defendant borrowed $38,979.19 and agreed to repay that sum in monthly installments of $927.00. As security for that loan, he granted Amalgamated an interest in Radio #106.

Defendant says he did not earn sufficient funds as a taxi driver to cover his payments and his costs. On September 2, 1989, he decided to lease the car and radio to another driver. On May 17, 1990 when defendant returned from working as a merchant marine, he discovered that his car was in a state of disrepair. Rather than repair it, he sold the car for $2000.00.

The parties agree that Amalgamated foreclosed on Radio #106. The record shows that the radio was sold at auction on December 22, 1992 for $ 10,000.00. After expenses and fees, Amalgamated received $ 8038.00.

II. Procedural History

On August 17, 1990 the National Credit Union Administration, an agency of the United States government, placed Amalgamated in involuntary liquidation and became Amalgamated's successor in interest. On January 19, 1995 it brought this action to recover on the promissory note, claiming $ 32,744.93 plus interest from January 16, 1995 at 15 per cent.

After the court entered the default judgment on September 11, 1996 defendant moved to vacate the default. On May 8, 1997 the court declined to vacate the default judgment, but found that the default was not willful and granted defendant leave to refile his motion, setting forth a defense to the foreclosure action. Defendant then renewed his motion but failed to serve it on plaintiff. On August 22, 1997, on an

incomplete record, the court found that defendant had alleged a meritorious defense sufficient to support a motion to vacate a default judgment because he had raised a significant question of material fact as to whether plaintiff had foreclosed on Radio # 106. The court then vacated the default judgment.

Both parties appeared before the court on October 31, 1997. At oral argument plaintiff said that it had not received any notice of defendant's renewed motion to vacate the default until August 21, 1997, and therefore had no opportunity to oppose the motion before the court issued its decision on August 22, 1997. The court then rescinded its August 22, 1997 order vacating the default, and directed plaintiff to file its opposition within one week.

III. Discussion

The court may vacate a default judgment if the default resulted from defendant's "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b). In deciding whether to vacate a default

judgment, courts examine three criteria: "(1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted." Davis v. Musler, 713 F.2d 907, 915 (2d Cir. 1983).

In its May 8, 1997 order the court determined that defendant's default was not willful. To justify vacating a default judgment resulting from a non-willful default, defendant must allege a "meritorious defense" to the action. Id. The defense "need not be ultimately persuasive at this stage." American Alliance Ins. Co., 92 F.3d at 61. Rather, a "defense is meritorious if it is good at law so as to give the factfinder some determination to make." Id. (quoting Anilina Fabrique de Colorants v. Aakash Chems. & Dyestuffs, Inc., 856 F.2d 873, 879 (7th Cir. 1988)).

In his papers defendant makes two arguments. First he says that on September 2, 1989 he leased the car and radio to a driver for UTOG 2-Way Radio Group (UTOG). He says that UTOG agreed to pay the monthly

installments on the note. When defendant discovered the car needed repairs on May 17, 1990, he sold it instead for $2,000.00. This action originally included UTOG as a defendant but the claim against them was discontinued on November 6, 1995. Defendant may have a valid third-party action against UTOG but that does not constitute a meritorious defense to his own liability to plaintiff.

The only other defense defendant raises is that plaintiff foreclosed on Radio #106 and had it sold at auction. In its papers plaintiff confirms that it did foreclose on Radio #106. But plaintiff says that the amount of the sale was duly credited to defendant's account, and that defendant was only sued for the resulting balance due, plus interest. The record supports that assertion.

Defendant has raised no meritorious defense to the action. The motion to vacate the default is denied.

So ordered.

Dated: Brooklyn, New York
August 5, 1998

Eugene H. Nickerson, U.S.D.J.